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No. 02-1186

**In the**

# Supreme Court of the United States

GUIDO A. PRONSOLINO, et al.,

*Petitioners,*

v.

WAYNE NASTRI, Regional Administrator, U.S. Environmental Protection Agency Region 9, et al.,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF FOREST LANDOWNERS OF CALIFORNIA, OREGON LANDS COALITION, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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28 pp

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Forest Landowners of California (FLC), Oregon Lands Coalition (OLC), and Pacific Legal Foundation (PLF) respectfully move to file this brief amicus curiae in support of the Petition for Writ of Certiorari. Written consent for amicus participation in this case was granted by counsel of record for Petitioners and all Respondents except for Pacific Coast Federation of Fishermen's Associations, et al., and Association of Metro Sewage Agencies.[1]

## INTEREST OF AMICI CURIAE

The Forest Landowners of California is a nonprofit association representing the interests of nonindustrial timberland owners throughout the state. The California Department of Forestry estimates there are over 30,000 nonindustrial forest properties (larger than 40 acres) in California, which account for about half of the private timberland in the state. Most of these entities are small, family-owned enterprises.

FLC's members engage in silvicultural activities that can create sediment which during rainstorms may enter streams as runoff. This is called nonpoint source pollution. California has developed a planning program funded and encouraged by the federal Clean Water Act (CWA), Sections 208 and 319, 33 U.S.C. §§ 1288 and 1329, that promotes methods of land use to keep the waters clear of such pollution. Under this state program timberland owners must employ the best management practices set out in California's own water quality regulations. *See* Cal. Pub. Res. Code §§ 4514.3, 4516.5, 4562.7. In fact, California has an elaborate system of water quality regulation.

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[1] Letters evidencing such consent have been filed with the clerk of the Court.

*See also* Cal. Fish & Game Code § 5650, *et seq.*, and Cal. Water Code § 13000, *et seq.* (Porter-Cologne Water Quality Control Act). However, as highlighted in this case, EPA has imposed an additional but unauthorized set of regulatory burdens through Section 303(d) of the CWA that seriously hampers FLC's members' ability to carry out their timber-related businesses.

Most of the small family businesses represented by FLC depend entirely upon the income from their low-impact timber harvesting activities to pay for living expenses, retirement, family, estate taxes, and college and educational needs. Increased operational costs resulting from Section 303(d) related restrictions have the potential to cause serious economic harm to FLC's members and the over 30,000 small timberland owners in California.[2]

Oregon Lands Coalition is a nonprofit Oregon corporation consisting of a statewide network of nearly 60 groups and associations. They share a common purpose of ensuring that public policy decisionmaking carefully considers the broad impacts environmental regulations have on landowners and communities as a whole. OLC's member groups include the Oregon State Farm Bureau, the Association of Oregon Loggers, the Oregon Sheep Growers, the Oregon Cattlemen's Association, the Oregon State Grange, and others. These associations represent the interests of thousands of individuals throughout Oregon.

For example, the Oregon State Farm Bureau has represented farmers, ranchers, and small timber owners for the past 77 years. Its more than 20,000 members represent one of the largest blocks of private landowners in Oregon. Because of

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[2] For example, three of the plaintiffs in this case are small timberland owners in Northern California. Due to these increased operational restrictions on where and when they may harvest their own trees, they have suffered additional costs of over $12 million.

the climate and geography that prevail there, many farms and ranches contain not only crop and grazing land, but also forest land. Each of these agricultural uses will be faced with costly land use restrictions as a result of the Ninth Circuit's decision below, just like the Petitioners in this case.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Litigating nationwide since 1973, PLF provides a voice in the courts for thousands of Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Coral Gables, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska. PLF has participated in numerous cases across the country concerning the interpretation of the Clean Water Act and its restrictions on landowners' rights to use their private property in a reasonable, productive manner.[3]

In separate appellate litigation also concerning the application of Section 303(d), PLF attorneys are currently representing several farmers and agricultural organizations. *Hawes v. Oregon*, Oregon Circuit Court for Baker County, Docket No. 00-198. The plaintiffs are challenging a highly restrictive state water pollution control program, adopted in mistaken reliance on the Ninth Circuit's ruling in this case that Section 303(d) applies to streams even though they do not have point sources of pollution. On December 7, 2002, the Oregon trial court ruled that Section 303(d) imposed restrictions do not

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[3] For example, PLF participated recently as amicus curiae before the United States Supreme Court in *Borden Ranch Partnership v. United States Army Corps of Engineers*, 123 S. Ct. 599 (2002), and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), both of which concerned the scope of authority granted to the Army Corps of Engineers and EPA under the federal Clean Water Act.

apply to streams with only nonpoint sources of pollution, e.g., agricultural runoff. The decision squarely conflicts with the Ninth Circuit's decision in this case. *See Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002).

But, if the Oregon Court of Appeals capitulates to the Ninth Circuit's decision herein, agricultural activities may be shut down on significant stretches of land. For instance, client Daryl Hawes produces livestock on both sides of the Burnt River in Baker County, Oregon. The river has no point sources of pollution, but due to its 303(d) listing, it is expected that agriculture will be prohibited from taking any actions that might increase the river's temperature in any amount. To comply, Hawes will not be able to use river water to irrigate his crops and water his cattle at certain times of the year when the volume and flow rate of the river need to be maintained to keep it cool. Without access to the River to water his cattle and irrigate his crops, he will have to develop other costly water resources, or change his land use to other less valuable crops or uses that need less water. As a result, the value of his land has already plummeted and he faces an uncertain future.[4]

Amici will augment Petitioners' arguments by showing that the Ninth Circuit's decision ignores the principles of federalism upon which the Clean Water Act is based. Amici

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[4] Numerous people similarly situated to the Hawes can also expect similar injuries. Just in California alone more than *15 million acres of land* would be affected by Section 303(d) restrictions attributable to nonpoint source-only pollution. California State Water Resources Control Board, *Staff Report: Revision of the Clean Water Act Section 303(d) List of Water Quality Limited Segments* (2003), *available at* http://www.swrcb.ca.gov/tmdl/docs/staff_report303d_vol1_011303.pdf. All farms, ranches, and timber operations within the jurisdiction of not only California, but the entire Ninth Circuit, are subject to massive restrictions that can actually *prohibit* landowners from farming, grazing, or harvesting their land or even preparing their land for these activities.

will explain how the plain language and comprehensive legislative history of the Act demonstrate Congress's clear intent that states, not the federal Environmental Protection Agency (EPA), are to be in control of regulating land use activities that may affect water quality. Unfortunately, the Ninth Circuit's decision allows EPA to micromanage rural land uses stripping states of their primary regulatory role over land, and subjecting landowners to severe regulatory mandates that may even force some to shut down their farming, ranching, and forestry operations.

For all the foregoing reasons, the motion of Forest Landowners of California, Oregon Lands Coalition, and Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: May, 2003.

Respectfully submitted,

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## QUESTIONS PRESENTED

Section 303(d)(1) of the Clean Water Act, 33 U.S.C. § 1313(d)(1), requires each State to identify those waters within its boundaries for which specified "effluent limitations . . . are not stringent enough to implement any water quality standard applicable to such waters," and to establish total maximum daily loads (TMDLs) of pollutants for those waters. Although effluent limitations are by definition applicable only to waters impaired by point sources, the Environmental Protection Agency (EPA) requires each State to identify and establish TMDLs for all its waters not meeting water quality standards, including waters not impaired by point sources and thus not subject to effluent limitations at all. On that basis, EPA imposed TMDLs on numerous California waters impaired only by nonpoint sources. The questions presented are:

1. Whether § 303(d)(1) requires a State to identify and establish TMDLs for all substandard waters within its boundaries, including those impaired only by nonpoint sources.

2. Whether permitting EPA to establish TMDLs for waters impaired only by nonpoint sources and thereby impose corresponding land use controls constitutes an impermissible federal intrusion into a core State function without a clear statement from Congress.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

INTEREST OF AMICI CURIAE ..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 2

THE NINTH CIRCUIT'S DECISION EVISCERATES CONGRESS'S INTENT TO PRESERVE THE STATES' AUTHORITY OVER WATER POLLUTION REGULATION THAT DICTATES LAND USE CHOICES AND RAISES AN IMPORTANT QUESTION CALLING FOR THIS COURT'S REVIEW ..... 2

A. The CWA's Plain Language Reserves Land and Water Use Decisions to the States ..... 2

B. Congress Did Not Intend That TMDLs Would Apply to Waters Affected Only by Nonpoint Sources of Pollution ..... 7

C. The Ninth Circuit's Decision Strips States of Their Primary Role over Land and Water Use, Raising Serious Federalism Issues ..... 13

CONCLUSION ..... 15

## TABLE OF AUTHORITIES

**Page**

### Cases

*FERC v. Mississippi*, 456 U.S. 742 (1982) ..... 14

*Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994) ..... 15

*Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981) ..... 14

*National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) ..... 3

*Natural Resources Defense Council v. United States EPA*, 16 F.3d 1395 (4th Cir. 1993) ..... 3-4

*Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417 (9th Cir. 1989), *modified*, 899 F.2d 1565 (9th Cir. 1990) ..... 3

*Pronsolino v. Marcus*, 91 F. Supp. 2d 1337 (N.D. Cal. 2000) ..... 13

*Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002) ..... 13

*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ..... 2, 13-15

*South Dakota v. Dole*, 483 U.S. 203 (1987) ..... 13

*Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) ..... 14

### Statutes

33 U.S.C. § 1251(b) ..... 5, 7-8, 15

§ 1288 ..... 4

**TABLE OF AUTHORITIES—Continued**

**Page**

§ 1288(a) ..... 12

§ 1288(b) ..... 12

§ 1288(b)(2)(F)-(I) ..... 12

§ 1288(g)-(j) ..... 12

§ 1311 ..... 3

§ 1311(b) ..... 6

§ 1311(b)(1)(A) ..... 8

§ 1311(b)(2)(A) ..... 8

§ 1313(d) ..... 8

§ 1313(d)(1) ..... 4

§ 1313(d)(1)(A)-(C) ..... 5-6

§ 1329 ..... 4, 11

§ 1342 ..... 8

§ 1342(a)-(d) ..... 3

§ 1362(11) ..... 3, 6

§ 1362(14) ..... 3

**Regulation and Rule**

40 C.F.R. § 130.2(h) (2003) ..... 4

Sup. Ct. R. 37.6 ..... 1

**TABLE OF AUTHORITIES—Continued**

**Page**

**Miscellaneous**

Conf. Rep., Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-1236 (1972), *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 (Comm. Print 1973) ..... 10-11

Continuing House Deb. on H.R. 11896, Mar. 28, 1972, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 (Comm. Print 1973) ... 10

Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948) ..... 7

Hale, Mandi M., *Comment: Pronsolino v. Marcus, The New TMDL Regulation, and Nonpoint Source Pollution: Will the Clean Water Act's Murky TMDL Provision Ever Clear the Waters?*, 31 Envtl. L. 981 (2001) ..... 10

House Consideration of the Rep. of the Conf. Comm., Oct. 4, 1972, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 (Comm. Print 1973) .... 11

House Rep., Fed. Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-911 (1972), *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 (Comm. Print 1973) ..... 9

**TABLE OF AUTHORITIES—Continued**

**Page**

S. Consideration of the Rep. of the Conf. Comm., Oct. 4, 1972, presentation by Sen. Muskie, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 (Comm. Print 1973) ..... 7-8, 11

Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965) ..... 7

White, L., *The States and the Nation* (1953) ..... 14

## INTEREST OF AMICI CURIAE[1]

The interests of Amici Curiae Forest Landowners of California, Oregon Lands Coalition, and Pacific Legal Foundation are set forth in the preceding motion.

## SUMMARY OF ARGUMENT

The Ninth Circuit's decision ignores the principles of federalism upon which the Clean Water Act's (CWA) strategy to clean the Nation's waters was based. Specifically, the decision conflicts sharply with the division of responsibilities Congress outlined between the Environmental Protection Agency (EPA) and the states. In crafting the CWA, Congress envisioned a structure in which EPA would act primarily as an oversight and support agency for *state* regulatory efforts directed at nonpoint source water pollution control. Though EPA's role is critical in establishing nationwide goals and standards, its direct regulatory power is limited. Instead, Congress intended that states take the lead in implementing the goals and policies of the Act, and in so doing would have exclusive control over land use policies.

One particular feature of this cooperative structure in deferring to state control over land use is the explicit distinction Congress drew between point and nonpoint sources of pollution. Specifically, Congress focused EPA's regulatory authority on controlling point-source discharges. With the exception of imposing limited conditions on the provision of federal funding, Congress left nonpoint source regulation to the states.

But EPA's new interpretation of Section 303(d) of the CWA, as upheld by the Ninth Circuit, would upset the federal-

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation of submission of this brief.

state division of responsibilities that Congress created. By injecting itself into the micromanagement of land uses that is central to addressing waters affected only by nonpoint sources of pollution, EPA has set itself up as a sort of super land use planning agency that has ultimate authority over all local land use decisions that may in some way affect water quality. This is an outcome that stands the CWA on its head. It strips states of their appropriate water quality planning role under the Act and their long-held, traditional and primary power over land use planning. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173 (2001) (*SWANCC*). Accordingly, this is a very important case that should be reviewed by this Court.

## ARGUMENT

### THE NINTH CIRCUIT'S DECISION EVISCERATES CONGRESS'S INTENT TO PRESERVE THE STATES' AUTHORITY OVER WATER POLLUTION REGULATION THAT DICTATES LAND USE CHOICES AND RAISES AN IMPORTANT QUESTION CALLING FOR THIS COURT'S REVIEW

This case raises an important issue: May the Ninth Circuit allow the constitutionally designed *federal* structure of our Nation to be undermined by an administrative agency's misreading and overzealous application of a federal statute? In this case, the Ninth Circuit succumbed to EPA's quest for more power, but in so doing subverted Congress's promise that in addressing water pollution states would retain their traditional, primary role over land and water use planning. The Ninth Circuit's decision below ignores this promise.

#### A. The CWA's Plain Language Reserves Land and Water Use Decisions to the States

The federal CWA was adopted to control the amount of pollution entering the Nation's waters. It divides sources of

water pollution into categories by the way it is introduced into receiving waters. *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988). The first category consists of the discharge of pollutants from a "point source." Point source is defined as "any discernible, confined and discrete conveyance," and includes such things as a pipe, ditch, or channel. 33 U.S.C. § 1362(14). The second category consists of pollution that comes from a "nonpoint source." The CWA does not define "nonpoint source," but it has been construed as "any source of water pollution or pollutants not associated with a discrete conveyance . . . includ[ing] runoff from fields [and] forests." *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1424 n.8 (9th Cir. 1989), *modified*, 899 F.2d 1565 (9th Cir. 1990).

Under the regulatory scheme of the CWA, point source pollution is prohibited unless EPA, or the state via an EPA-approved program, has issued a permit (33 U.S.C. § 1311) specifying pollutant discharge conditions and restrictions. 33 U.S.C. § 1342(a)-(d). The permit typically contains numerical limits on the amounts of specified pollutants the permittee may discharge into navigable waters. The limits are known as "effluent limitations" which by definition apply only to point source discharges. 33 U.S.C. § 1362(11). This scheme also requires a state to identify as impaired those waters for which the "effluent limitations" are not stringent enough to meet the applicable state-imposed water quality standards[2] and establish

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[2] [T]he CWA requires each state to adopt water quality standards for all waters of that state and to review them at least every three years. *Id.* §§ 1313(a), (b), (c)(1) (1982 & Supp. 1993). To adopt these standards, states must first classify the uses for which the water is to be protected, such as fishing and swimming, and then . . . determine the level of water quality necessary to protect those uses. Thus, the following three factors are considered when adopting or

(continued...)

Total Maximum Daily Loads, or TMDLs, for the pollutants entering those affected waters. CWA, Section 303(d)(1), 33 U.S.C. § 1313(d)(1); 40 C.F.R. § 130.2(h) (2003).

Nonpoint source pollution is dealt with in a different manner. Section 208 of the CWA, 33 U.S.C. § 1288, gave states the responsibility to draft area wide waste treatment management plans for identifying sources of nonpoint pollution and establishing best management practices to control such pollution. The Act provided financial incentives for nonpoint sources to adopt best management practices but did not penalize anyone for failing to do so. In 1987, Section 319, 33 U.S.C. § 1329, was added providing new grant opportunities to states which had complied with the nonpoint source reporting and planning goals established by Section 319.

Section 303(d)(1) of the CWA, 33 U.S.C. § 1313(d)(1), is the focus of this case. It requires states to identify as impaired certain water bodies that have not met state water quality standards and then establish TMDLs for the pollutants that are causing those water bodies not to meet their standards. The critical question advanced in this case is whether Congress ever intended that those waters affected only by nonpoint sources of pollution, i.e., farming, forestry, be listed as impaired and have mandatory TMDLs assigned to them. The reason this question

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[2] (...continued)

evaluating a water quality standard: (1) one or more designated uses of the state waters involved; (2) certain water quality criteria, expressed as numeric pollutant concentration levels or narrative statements representing a quality of water that supports a particular designated use; and (3) an antidegradation policy to protect existing uses and high quality waters. *Id.* § 1313(c)(2)(A) (Supp. 1993); 40 C.F.R. § 131.

*Natural Resources Defense Council v. United States EPA*, 16 F.3d 1395, 1400 (4th Cir. 1993).

has practical and constitutional importance[3] is that if the answer is yes, the only way the federally mandated TMDLs can be met is to change land use practices. In other words, despite Congress's promises to the contrary, states will be forced by EPA to eliminate or change land uses as the only way to reduce pollutant levels in these waters.

Stripping the wheat from the chaff, the fundamental issue is this: Does Section 303(d)(1) of the CWA grant EPA authority to mandate TMDLs for water bodies affected only by nonpoint source runoff? The plain language of Section 303(d)(1) expressly assigns to states the responsibility to establish TMDLs only for waters that receive "effluents" which by definition come singularly from *point* sources. The Section reads:

> (A) Each State shall identify those waters within its boundaries *for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title* are not stringent enough to implement any water quality standard applicable to such waters. . . .
>
> . . . .
>
> (C) Each State shall establish *for the waters identified in paragraph (1)(A) of this subsection* . . . the total maximum daily load, for those pollutants which the Administrator identifies . . . as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards . . . .

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[3] The Ninth Circuit's decision raises serious concerns about federal intrusion into state affairs "to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

33 U.S.C. § 1313(d)(1)(A)-(C) (emphases added). Sections 1311(b)(1)(A) and (B), referenced in Section 1313(d)(1), state, respectively:

> (b) . . . In order to carry out the objective of this chapter there shall be achieved—
>
> (1)(A) not later than July 1, 1977, *effluent limitations for point sources*, other than publicly owned treatment works . . . .
>
> (B) for publicly owned treatment works in existence on July 1, 1977 . . . *effluent limitations* based upon secondary treatment . . . .

33 U.S.C. § 1311(b) (emphases added). The term "effluent limitation" is defined in the CWA as:

> [A]ny restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents *which are discharged from point sources* . . . .

33 U.S.C. § 1362(11) (emphasis added). Thus, as written, it is patently clear that Sections 1311(b)(1)(A) and (B) can apply *only* to point sources of pollution. Nevertheless, the Ninth Circuit's decision below not only dismissed this express language, but also the historical underpinnings of the CWA and states' traditional responsibility under our federal system of government to plan the development and use of land and water. Any doubt as to what the language of Section 303(d)(1) means is dispelled by reviewing the history of the Clean Water Act and recognizing that no deference may be given to the Ninth Circuit's interpretation which extinguishes the traditional and constitutionally designed role of states over land use control.

**B. Congress Did Not Intend That TMDLs Would Apply to Waters Affected Only by Nonpoint Sources of Pollution**

The Federal Water Pollution Control Act first adopted in 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948), and as amended by the Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965), was an initial effort to clean our Nation's waters by having the states establish water quality standards[4] for their waters, and providing courts authority to grant relief from nuisance-like pollution after considering the practicability and economic feasibility of abatement. But the approach of each state simply setting water quality standards and coupling that with a fairly weak enforcement system was ineffective. It was just too difficult to determine what individual discharger or pollution source was the ultimate cause of exceeding the water quality standard; moreover state water quality programs were severely underfunded. *See generally* S. Consideration of the Rep. of the Conf. Comm., Oct. 4, 1972, presentation by Sen. Muskie, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1 at 164-65 (Comm. Print 1973).

As a result of this need to change the way it approached water pollution, Congress adopted the Federal Water Pollution Control Act of 1972. Congress made it clear, however, that while the strategy would change, the primary role of the states would not. In the preamble to the 1972 Act, Congress emphasized this deference stating:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources, and to

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[4] *See* n.2, *supra*, at 3-4.

> consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b). This was a central theme of the 1972 Act; the federal government would not arrogate to itself the traditional responsibilities and roles of the states. But Congress also knew some strategy changes were needed to reduce water pollution. As such, Congress expressly addressed point source pollution with a new approach: advanced mandated *technological* controls.

In an attempt to avoid economic dislocation, Congress took a stepped approach to achieving the goals of the CWA and set a national goal that by January 1, 1976, all point source controls would be required to comply with "the best practicable control technology currently available." 33 U.S.C. § 1311(b)(1)(A). That is, any factory or plant discharging effluent from a point source into the Nation's waters was given a deadline by which to employ technologically available and affordable pollutant control systems. This standard was enforced through the Act's permitting scheme, outlined in Section 402 of the Act (33 U.S.C. § 1342). By January 1, 1981, all point sources had to employ a stricter standard of effluent control: "best available technology." 33 U.S.C. § 1311(b)(2)(A). This provision required effluent dischargers to use the best technology developed for controlling pollutant discharges, virtually regardless of cost. The hope was that these long-range requirements would encourage the development of affordable and effective technologies to address effluent discharges, and allow the economic activities of the Nation to continue with minimal disruption. *See, e.g.*, S. Consideration of the Rep. of the Conf. Comm., *in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, *supra*, at 169-70.

Congress also adopted in 1972 Section 303(d), 33 U.S.C. § 1313(d), to further enhance the likelihood that the Act's

controls on point source discharges of pollution would succeed in cleaning the Nation's waters. First, water quality standards were promulgated pursuant to Section 303(d) as a goal against which to measure the amount of pollution reduction success *point source* controls had achieved. Second, in the event goals had not been achieved and such waters remained impaired, the standards were a basis to establish yet more stringent effluent limitations further reducing the pollutant load levels discharged from point sources. The House Report to H.R. 11896, which introduced Section 303(d) to the CWA's legislative process, explained:

> Subsection (d)(1) of section 303 requires each State to identify . . . those waters . . . for which the effluent limitations required for non-publicly owned point sources and for publicly owned treatment works . . . are not stringent enough to implement any water standard applicable to such waters. . . .
>
> The State shall establish from any waters so identified . . . the total maximum daily load [TMDL] . . . .

House Rep., Fed. Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-911, at 106 (1972), *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1, at 793 (Comm. Print 1973). Given that the House Bill was the origin of TMDLs, it is telling that the House Report explained Section 303(d) exclusively in terms of point source controls. There is no indication that the water quality standards imposed by Section 303(d) were intended to be directed at nonpoint sources.

Specifically, the purpose of TMDLs was to provide a backstop standard for point source controls: to ensure that, first, the point source control program was working, and, second, even if point source dischargers were already complying with the mandates of Sections 301(b)(1)(A)

and (b)(2)(A) but still not achieving the applicable water quality standards, such dischargers might nonetheless be required to comply with greater control measures.[5] TMDLs were imposed under Section 303(d) to define the amount and kind of pollutants that a given water segment could withstand and still meet applicable water quality standards. Accordingly, the states (or EPA, depending upon who was implementing the Section 402 permitting scheme) could identify which pollutants (or polluters) warranted more stringent effluent controls.

As the Section 303(d) TMDL proposal wound through the legislative process, every congressional statement relating to Section 303(d) explained the provision only in terms of its utility in establishing effluent standards which, as stated *supra* at 9-10, relate only to point source discharges.[6] Thus, these

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[5] *See* Mandi M. Hale, *Comment: Pronsolino v. Marcus, The New TMDL Regulation, and Nonpoint Source Pollution: Will the Clean Water Act's Murky TMDL Provision Ever Clear the Waters?*, 31 Envtl. L. 981, 996 (2001) (author argues that Section 303(b)(1)(C)'s requirement of more stringent effluent limitations if water quality standards are not met through best practicable control and best available control technologies of Section 301(b)(1)(A) and Section 301(b)(1)(B) are met through imposition of TMDLs).

[6] For example, Congressman Harsha explained:

> [I]ndustry will be on notice now that they . . . have to go beyond [best practicable technology] and assure that the *best practicable technology will meet the water quality standards and the load limits* . . . .

Continuing House Deb. on H.R. 11896, Mar. 28, 1972, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1, at 524 (Comm. Print 1973) (emphasis added). And, "Subsection (d)(1) requires each State to identify the waters . . . *for which effluent limitations required by section 301 are not stringent enough* to implement a water quality

(continued...)

statements demonstrate that Section 303(d)'s mandate to establish TMDLs on impaired water bodies was intended, understood, and designed for the express purpose of defining more stringent effluent limitations on point source discharges. In fact, Amici could not find a single report or debate that discussed Section 303(d)'s TMDL standard as a means of setting limitations on nonpoint source pollution. Instead, in 1972, nonpoint source pollution control was addressed only under Section 208 of the Act.[7]

In contrast to the CWA's provisions for point source controls, the Act's provisions for nonpoint sources of pollution

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[6] (...continued)
standard . . . .", Conf. Rep., Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-1236, at 123 (1972), *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1, at 306 (Comm. Print 1973) (emphasis added). Also, "[s]ection 303 contains provisions for the identification of waters *where the technological standards are not stringent enough* to implement applicable water quality standards. *For these waterways*, the States are required to establish load limits . . . ." House Consideration of the Rep. of the Conf. Comm., Oct. 4, 1972, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, Vol. 1, at 246 (Comm. Print 1973) (emphases added). And finally: "To the extent the *State* may wish to continue an examination of water quality *in order to determine if more restrictive effluent limits may be required*, this section [303] will be useful." S. Consideration of the Rep. of the Conf. Comm., Oct. 4, 1972, *reprinted in* 93d Cong., 1st Sess., A Legis. History of the Water Pollution Control Act Amendments of 1972, *supra*, at 171 (emphases added).

[7] Congress amended the CWA in 1987 also to address nonpoint source pollution in Section 319. There again, nonpoint source pollution control was left in the hands of the states as EPA's role is limited to providing standards, expertise, and funding. *See* 33 U.S.C. § 1329.

contained a distinctly different federal approach. Under the proposed bills, and as finally enacted, Section 208 addressed *state-created plans* for controlling nonpoint sources of pollution and focused the federal role primarily on providing a funding mechanism and expert assistance for developing such plans. The federal *regulatory* role was strictly limited to providing approval of the plans. *See* 33 U.S.C. § 1288(g)-(j).

Of course, like many federal funding measures, Congress did impose conditions upon the states in return for federal funds. Section 208's most fundamental condition is that states must develop and operate a continuing area wide waste management plan. 33 U.S.C. § 1288(b). However, conditions regarding the plan still left it to the states to develop and implement their nonpoint source pollution control programs specifically describing Section 208 as a mechanism for

> (a) . . . *encouraging and facilitating* the development and implementation of areawide waste treatment management plans . . . .

33 U.S.C. § 1288(a) (emphasis added).

In fact, while each plan is to include specific elements, the severity of these elements is subject to the judgment of each state. Specifically, a state's plan is asked to include, *if appropriate*, a series of procedures and methods (including land use requirements) to control certain nonpoint sources of pollution, *to the extent feasible*. *See* 33 U.S.C. § 1288(b)(2)(F)-(I). This deferential approach to *state* pollution control decisions for nonpoint sources stands in stark contrast to the mandatory standards related to point sources.

Overall, the legislative history and plain language of the CWA shows that Congress placed broad discretion in the states to regulate nonpoint source controls, subject only to minimum

federal standards for funding.[8] Contrary to the ruling by the Ninth Circuit, Congress did not authorize EPA to require states to impose the TMDL requirement of Section 303(d) on waters that contain no point sources of pollution. States are therefore governed only by area wide waste management plans under the Section 208 planning process.

### C. The Ninth Circuit's Decision Strips States of Their Primary Role over Land and Water Use, Raising Serious Federalism Issues

EPA's grafting of Section 303(d) TMDL mandates onto a state's nonpoint source control program turns the Act on its head and strips from states their traditional and primary role over land use. *SWANCC*, 531 U.S. at 174. In short, EPA's application of Section 303(d) alters the entire nature of the

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[8] The courts below minimized concerns about the mandatory nature of the Section 303(d) TMDL process by contending that the inclusion of NPS-impaired water bodies under Section 303(d) did not necessarily intrude on state prerogatives to regulate nonpoint sources because "[a] state could even refuse to implement a TMDL . . . although to do so might provoke EPA to curtail or to deny grant money to the state." *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1356 (N.D. Cal. 2000); *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2003) ("States must implement TMDLs only to the extent that they seek to avoid losing grant money . . . ."). *See also* Petition for a Writ of Certiorari at 24 (discussing EPA's warning that failure to implement its TMDLs might prompt the agency to engage in "nasty little tricks" with grants and such). But the provisions of Title II in general—and Section 208 in particular—expressly spell out the conditions Congress imposed on the provision of federal funding. Neither the Ninth Circuit nor EPA has provided any statutory or case authority for the proposition that an agency may conflate a federal Act to make the conditional funding provisions of one part (here, Title II) depend upon compliance with any other provision (here, their interpretation of Title III). Congress, and not executive agencies, has power under the Spending Clause to condition funding. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

Section 208 area wide waste management plan. It is no longer a state plan outlining the *state's* discretionary efforts to reduce nonpoint source discharges, but is now a plan that must include EPA-imposed TMDL mandates. This raises significant constitutional and federalism questions. As explained in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 289 (1981), "forc[ing] States to choose between performing tasks set by Congress and abandoning . . . land use regulation," a "field traditionally reserved to state authority" raises serious Tenth Amendment and federalism concerns. *See FERC v. Mississippi*, 456 U.S. 742, 783 & n.12 (1982) (O'Connor, J., partial concurrence; partial dissent) ("'A federal system implies a partnership, all members of which are effective players on the team and all of whom retain the capacity for independent action. It does not imply a system of collaboration in which one of the collaborators is annihilated by the other.'" (quoting L. White, *The States and the Nation* 3 (1953))). And there is in the CWA "nothing approaching a clear statement from Congress that it intended" to empower the federal government to preempt the entire field of water quality regulation and land use planning. *See SWANCC*, 531 U.S. at 174. Without such a "clear statement," this Court should not permit such a shift in power. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000).

The Ninth Circuit's decision that embraces EPA's expansive interpretation of its power under the CWA, of course raises this same concern about federal intrusion into state affairs. Unlike the Ninth Circuit, however, this Court has noted: "[W]here an administrative interpretation [such as EPA's concerning Section 303(d)] alters the federal-state framework by permitting federal encroachment upon a traditional state power," *SWANCC*, 531 U.S. at 173, such concern is heightened and deference to administrative interpretation is properly rejected. Specifically, the Ninth

Circuit's decision in this case that Section 303(d) allows EPA to take over a state's discretionary nonpoint source pollution prevention planning by mandating TMDLs for waters affected only by nonpoint sources "would result in a significant infringement of the states' traditional and primary power over land and water use." *Id.* at 174. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."). "Rather than expressing a desire to readjust the federal-state balance [in adopting the CWA], Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .' 33 U.S.C. § 1251(b)." *SWANCC*, 531 U.S. at 174.

But the Ninth Circuit's decision fails to recognize this division of responsibility and strips from the states their primary role in solving land use and water quality problems. This cannot be what Congress intended; certainly, it is not what Congress said. Protection from nonpoint source pollution was to remain in the hands of the states according to Section 208. It was never intended that states would lose their sovereign power over land use decisions and be subjected to EPA control under Section 303(d).

## CONCLUSION

By enacting the Clean Water Act, Congress never intended EPA to grab from states their traditional authority to prescribe local land uses to address water quality problems. Under Sections 208 and 319 of the CWA, Congress reserved this role only for states. Nevertheless, the Ninth Circuit's decision shifts this role to EPA by gratuitously expanding EPA's authority under Section 303(d) of the CWA. This arrogation of power

creates a serious federalism problem calling for this Court's review. The Petition for Writ of Certiorari should be granted.

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